and other points in Pennsylvania in 1959. From the President's evidence it was fairly inferable that Arrow trailers carry a full load of goods for either its Philadelphia or Allentown terminal with no New Jersey stops to pick up or deliver goods.

Proofs applicable completely warranted the conclusion in this instance, as with Hudson, that Arrow's route was almost double Pennsylvania intrastate route mileage for the distance and for time of run.

Finally, as to the reason for this type of routing the President was asked the following questions and answered as appears:

> "Q. In view of the fact that in each of these instances your New Jersey route is longer and involves more driving time, why do you go that way? Why don't you go the short route directly through Pennsylvania?
>
> A. It is the only authority that we have, granted from the ICC."
>
> "N.T. 215.
>
> Exam. Hanback: Let us assume you had freight moving from Philadelphia to Easton and Scranton only and there were no regulations.
>
> Q. (By Mr. Graf) And no regulations.
>
> A. If there was no regulation, I guess you would take whatever you figured to be the—whether it was the shortest route or the one with the lowest traffic, you would take the most convenient route if there was no regulation.
>
> Q. Let us take another specific example, Philadelphia and Scranton, which way would you go?
>
> A. I would probably go over the [Pennsylvania] turnpike."

Enough has been presented of the evidence to reveal the virtually undisputed pertinent situation of Hudson and

Arrow. Neither one of them possesses, nor it would seem can they obtain, Pennsylvania intrastate certificates for routes between Philadelphia and Allentown, Scranton and adjacent Pennsylvania municipalities. Each of them therefore took two of their I.C.C. interstate certificates and tacked them together. By virtue of this move, they both claim they now have the right to carry Pennsylvania intrastate freight under their tacked interstate certificates by way of New Jersey. This is not a physically surreptitious action. The carriers are not really seeking to hide this from view. What they maintain is that the certificates are genuine and that the practice of tacking them, with the result before us, is valid. That result is engaging in important Pennsylvania intrastate traffic under the aegis of their tacked I.C.C. certificates and so stultifying that state's control of its own intrastate, its local Pennsylvania motor carrier business.

The procedure followed by the Pennsylvania Public Utility Commission in bringing these situations to the Interstate Commerce Commission is entirely proper. The Supreme Court in Service Storage & Transfer Co., Inc. v. Virginia, 359 U.S. 171 (1959) has told us that the interpretation of the kind of problem before us is, in the first instance, for the Interstate Commerce Commission under § 204(c) of the Interstate Commerce Act, 49 U.S.C. § 304(c). And see Jones Motor Co. v. Pennsylvania Utility Commission, 361 U.S. 11, Pet. recon. and clar. den. 361 U.S. 904 (1959).

What the P.U.C. claimed to the Interstate Commerce Commission by its complaint was that in their actions outlined heretofore, Hudson and Arrow had abused their interstate certificates. In effect it alleged that the protested interstate routes of the truckers were nothing more than ingenious schemes to evade Commonwealth of Pennsylvania regulations of the intrastate motor carrier business concerned by running the vehicles under the tacked

interstate certificates. In Service, see p. 176, there was uncontracted evidence that the trucker's operations "* * * is not only practical, efficient and profitable, but also that the creation of this 'flow of traffic' is a timesaver to the shipper since there is less time lost waiting for the making up of a full truck load. It also claims a unique service for less-than-truckload shipments of central Virginians who ship commodities to southwest Virginia and Kentucky and who otherwise would suffer long delays on deliveries or would be obliged to ship by special truck at higher rates. While these considerations are not controlling, they throw light on petitioner's claim of bona fides." Against this was proof by Virginia, p. 175, "* * * that petitioner's routes were circuitous and often long, sometimes exceeding twice the shortest possible route. However, it offered no direct evidence of bad faith on the part of petitioner in moving its traffic through Bluefield, West Virginia."

The Supreme Court made no attempt to decide the question of bad faith in Service because it was of the opinion and so held, p. 177: "It appears clear that interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action." The case was therefore reversed with the suggestion to the Commonwealth of Virginia that (p. 179): "If it believes that petitioner's operation is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the Act. Section 204(c), supra, note 2, authorizes the filing of a 'complaint in writing to the Commission by any * * * State Board * * * [that] any * * * carrier * * *' has abused its certificate." Generally regarding "bona fide operation" see McDonald v. Thompson, 305 U.S. 263, 266 (1938); Eichholz v. Public Service Commission of Missouri, 306 U.S. 268, 274, Pet. for rehrg den. 306 U.S. 622 (1939).

In these actions Pennsylvania has followed the course charted by the Supreme Court. The latter in Service noted the finding of the Interstate Commerce Commission in its own Service declaratory opinion, 71 M.C.C. 304. The Commission there acted on the carrier's petition for a declaratory order interpreting its certificate. The Virginia Commission did not participate in that proceeding. The I.C.C. construed petitioner's certificate as authorizing Virginia to Virginia traffic routed through Bluefield, West Virginia. As to this, it states, as quoted in Service, Note 4, p. 178: "In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters, we are of the opinion that petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce." There was no occasion under the circumstances for the Supreme Court to pass upon that rule in its Service opinion. It is, however, squarely before us now and is in our judgment a sound, fair test for evaluating the operations of the carriers with which we are concerned.

From all of the evidence in these two suits the unavoidable conclusion is that the Hudson and Arrow routes involved are not logical and normal operations through their headquarters; that the use by Hudson and Arrow of their tacked on routes is a deliberate, calculated method employed by those carriers to avoid the unfavorable consequences to them of their intrastate Pennsylvania traffic coming within the rightful jurisdiction of the Utility Commission of that Commonwealth. Said evidence overwhelmingly points to those tacked on routes as artificial, contrived arrangements adopted by Hudson and Arrow in order to obtain desirable Pennsylvania intrastate business which would be otherwise unavailable to them. The record makes it very clear that we are here dealing not with bona fide transportation in interstate commerce but with a

mystic maze route which is a more or less shrewd expedient designed solely to escape the control of the Pennsylvania Commission. In the full sense of the word, the operations are subterfuges.[1]

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[1] In accordance with the instruction of the Supreme Court in Service, supra, the Pennsylvania Public Utility Commission filed a complaint against Jones Motor Co., Inc. before the Interstate Commerce Commission. After hearing, the Commission Examiner, following the Service decision, found that the longer, circuitous routes utilized by Jones in and of themselves were not proof of bad faith or subterfuge. The Commission adopted the Examiner's statement of facts but concluded that the Jones transportation constituted a subterfuge. The Jones company filed a complaint in the United States District Court for the Eastern District of Pennsylvania seeking reversal of the Commission's decision. That case was heard in due course and has just been decided (June 4, 1963). The majority opinion held that the Commission's Order is not supported by substantial evidence, that the evidence proved the interstate character of 108 shipments which were comingled with the 22 challenged intrastate shipments; that less than five per cent of plaintiff's business concerns such challenged transportation; that aside from testimony that Jones' routes were circuitous and somewhat long, no direct evidence of bad faith on the part of Jones was offered. The Court then concluded that "*Since the Commission, in its Order, bottomed its finding of bad faith solely upon the circuity of routing by Jones after agreeing with the Examiner in most respects, we must reject this unwarranted conclusion and adopt the Examiner's 'Corrected Report and Recommended Order'.*" (Emphasis supplied)

The Jones facts as presented in the majority opinion, are practically those noted in Service. The situation in Hudson and Arrow is radically different. In both these disputes, the Commission has justifiably found that the all important element of subterfuge in endeavoring to escape the impact of Pennsylvania supervision is the entire motivation of the routing via New Jersey. Also in Jones the Examiner found that, with regard to the circuitous routing, "It is not illogical, but in fact is more practical and feasible from the standpoint of operating efficiency and economy, for a carrier to include in the same vehicles with 108 shipments, which are admittedly in interstate commerce and moving over routes specified in its interstate certificates, 22 other shipments, over a period of four specified days, which, if defendant

It is strongly evident from the whole of the evidence that plaintiffs have absued their disputed certificates and that the Interstate Commerce Commission was justified in so finding and in issuing its cease and desist orders. This was appropriate action in accordance with the opinion of the Supreme Court in Service, supra, and with the mandate of the National Transportation Act "to cooperate with the several States and the duly authorized officials thereof". 49 U.S.C. Preamble to the Interstate Commerce Act.

The complaints will be dismissed.

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had held the appropriate authority, might technically have been moved by themselves over a shorter route." Under the particular facts, the Examiner said that it was not likely the carrier would have used a shorter route even if such had been available. He himself recognized the vital difference between the Jones facts and those in Hudson and Arrow. He stated:

> *"In the Hudson case division 1 found subterfuge because there was no logical reason for the circuitous routing via another State other than that the defendants therein were without appropriate intrastate authority, and in fact defendants therein admitted that, in the absence of any regulation of the challenged transportation, more direct routes would have been employed. Assuming that the division's findings in the Hudson case are not reversed after consideration of the pending petitions for reconsideration, the decision in that case does not form a basis for a holding of subterfuge in the instant proceeding."* (Emphasis supplied).

As we have seen, the referred to findings of Division 1 in Hudson and Arrow were affirmed by the Commission.

From all of the above it is apparent that on substantially different facts found by the Interstate Commerce Commission Examiner, accepted by the Commission and relied upon by the District Court, the routing in the Jones litigation was upheld. The issue before us as we have above detailed is not the one found by the Court to exist in Jones and there decided. Actually the Jones decision in effect strongly supports the rightness of our conclusion in these cases on their own particular facts.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 362-62

HUDSON TRANSPORTATION COMPANY, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant.

Civil Action 306-62

ARROW CARRIER CORPORATION, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant.

Findings of Fact and Conclusions of Law

FINDINGS OF FACT

The facts are virtually undisputed. The findings as to these are as set out in the opinion and therefore will not be separately enumerated.

CONCLUSIONS OF LAW

1. Under the particular acts, plaintiffs by their challenged operations, misuse the Interstate Commerce Commission certificates involved in order to obtain the protection granted by them for bona fide interstate use, for transportation of property which originates and terminates in Pennsylvania and in that way avoid the rightful jurisdiction of the Commonwealth of Pennsylvania over said transportation.

2. There is overwhelming evidence on the whole cases to support the findings of the Interstate Commerce Commission and its cease and desist orders in these proceedings.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 362-62

HUDSON TRANSPORTATION COMPANY, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant.

Civil Action 306-62

ARROW CARRIER CORPORATION, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant.

Order

In accordance with the opinion of the court in these matters filed today, together with the findings of fact as stated and conclusions of law also filed today, the complaints in both these actions are dismissed, with costs.

/s/ GERALD MCLAUGHLIN
Circuit Judge

/s/ REYNIER J. WORTENDYKE, JR.
District Judge

/s/ ARTHUR J. LANE
District Judge

Dated: June 14, 1963.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil 306-62

ARROW CARRIER CORPORATION, *Plaintiff*

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant

Defendants' Costs

Docket Fee $20.00

Defendant's costs taxed as Twenty Dollars.

MICHAEL KELLER, JR., *Clerk*

By

VERA A. ALEXANDER,
Deputy Clerk

Dated: Newark, N.J.
June 18, 1963

APPENDIX D

INTERSTATE COMMERCE COMMISSION

Service Date March 27, 1962

No. MC-C-2671[1]

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

HUDSON TRANSPORTATION COMPANY

Decided March 19, 1962

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1. On reconsideration, findings in prior report, 83 M.C.C. 729, that the defendants in Nos. MC-C-2671 and MC-C-2696 engaged in the transportation of freight between points in Pennsylvania, through points in New Jersey, as a subterfuge to evade the laws of Pennsylvania, *affirmed*. However, such transportation, although ostensibly authorized by defendants' certificate, found to violate the Interstate Commerce Act. Cease and desist order entered.

2. In Nos. MC-113933, MC-71536 and MC-71536 (Sub-Nos. 1, 2, and 3) petitions requesting an interpretation of defendants' outstanding certificates denied in view of the interpretation thereof made in the complaint proceedings.

Appearances as shown in the prior report, and, in addition, *Joseph I. Lewis* for complainant and *Carl Helmetag, Jr.*, for intervenor in support of complainant.

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[1] This report also embraces No. MC-C-2696, Pennsylvania Public Utility Commission v. Arrow Carrier Corporation; No. MC-113933, Hudson Transportation Company—Petition for Declaratory Order; and Nos. MC-71536 and MC-71536 (Sub-Nos. 1, 2 and 3), Arrow Carrier Corporation—Petition for Declaratory Order.

REPORT OF THE COMMISSION ON RECONSIDERATION

WEBB, *Commissioner:*

These proceedings involve related issues and were disposed of by division 1 in a consolidated report decided November 30, 1960, hereafter referred to as the prior report. 83 M.C.C. 729.

In No. MC-C-2671, by complaint filed August 24, 1959, and in No. MC-C-2696, by complaint filed October 8, 1959, the Pennsylvania Public Utility Commission, hereafter called P.U.C., alleges that Hudson Transportation Company and Arrow Carrier Corporation, respectively, (1) are motor carriers holding certain authorities issued by the Interstate Commerce Commission, and, as such, are subject to provisions of the Interstate Commerce Act, and (2) have transported property by motor vehicle between certain points in the Commonwealth of Pennsylvania, over routes through points in the State of New Jersey, without first having obtained appropriate certificates of public convenience and necessity from the Interstate Commerce Commission as required by sections 203(c) and 206(1) of the Interstate Commerce Act, or having obtained a certificate from P.U.C., as required by sections 202(b) and 202(c) of the Public Utility Law of Pennsylvania. Complainant prays that the Commission issue an order requiring each defendant to cease and desist from the alleged violations.[2] Answers to the complaints were filed by defendants in the respective proceedings.

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[2] Motor Freight Express was permitted to intervene in support of complainant in No. MC-C-2696 and in opposition to both petitions. Highway Express Lines, Inc., Rodgers Motor Lines, Inc., Fowler and Williams, Inc., and Modern Transfer Co., Inc., were permitted to intervene in support of both complaints and in opposition to both petitions. By order of January 5, 1961, the Pennsylvania Railroad Company was permitted to intervene.

By petitions filed October 23, 1958, in No. MC-113933, and August 31, 1959, in Nos. MC-71536 and MC-71536 (Sub-Nos. 1, 2, and 3), Hudson and Arrow, respectively, request orders interpreting their outstanding certificates, or, in the alternative, they request that the Commission enter declaratory orders finding as to each petitioner (1) that its certificates do not limit it to the transportation of shipments moving between points in Pennsylvania, on the one hand, and, on the other, points in other specified States, and (2) that under its certificates it may conduct interstate operations between points in Pennsylvania through a New Jersey gateway pursuant to the authority described in its certificates and may interchange or interline shipments moving from or to points in Pennsylvania beyond the territorial scope of its authorities with connecting interstate carriers, so long as it actually moves such traffic through New Jersey.[3]

In his recommended report and order, the examiner found in No. MC-C-2671 and No. MC-C-2696, (1) that the described operations by defendants between Philadelphia, Pa., and points in Pennsylvania via points in New Jersey in the transportation of property which originates at a point in Pennsylvania and terminates at a point outside the State, and vice versa, are bona fide operations in interstate or foreign commerce, and are authorized by the defendants' certificates, No. MC-113933, No. MC-71536, and No. MC-71536 (Sub-Nos. 1, 2, and 3); (2) that defendants' transportation of property which originates at Philadelphia, Pa., and terminates at other points in Pennsylvania, and vice versa, is not authorized by their certificates;

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[3] Arrow and Hudson were permitted to intervene in support of each other's petition. P.U.C. was permitted to intervene in opposition to both petitions. The W. J. Dillner Transfer Company was permitted to intervene as its interest may appear. Dillner subsequently adopted by letter the position taken in the separate exceptions of Arrow and Hudson.

(3) that defendants have engaged in the transportation of the traffic described in (2) above without proper authority and in violation of section 206(a)(1) of the Act, and (4) that an order should be entered requiring each defendant to cease and desist from all operations of the character found in his report to be unlawful. The matters to which the petitions in No. MC-113933, No. MC-71536, and No. MC-71536 (Sub-Nos. 1, 2 and 3) are directed were found to have been disposed of in the recommended findings summarized above. Accordingly, the examiner recommended that the petitions be denied.

In the prior report division 1 found in Nos. MC-113933, MC-71536 and MC-71536 (Sub-Nos. 1, 2, and 3) that the considered operations by petitioners between the Pennsylvania points involved through points in New Jersey in the transportation of property both originating and terminating at points within Pennsylvania, were, but for their routing, actually in intrastate commerce; and that the petitions in these proceedings, to the extent that they seek an interpretation or order to the contrary, should be denied. In Nos. MC-C-2671 and MC-C-2696, division 1 found that the challenged operations by the respective defendants between points in Pennsylvania through points in New Jersey in the transportation of property originating or terminating at points outside of Pennsylvania are authorized by their certificates; and that these complaints, to the extent that they embrace such activities, should be dismissed. The challenged operations by defendants between the points in Pennsylvania involved, through points in New Jersey, in the transportation of property both originating and terminating at points within Pennsylvania were found to be, but for their routing, in intrastate commerce inasmuch as they were conducted as subterfuge to evade the laws of Pennsylvania. Defendants were not, however, found to be in violation of the Interstate Commerce Act. The complaints were dismissed to the extent they embraced such activity.

Upon consideration of petitions filed by complainant,[4] by Arrow and by Hudson, and replies to the defendants' petitions filed by complainant and supporting intervenors, we reopened the proceedings for reconsideration on the present record. On petition complainant and supporting intervenors seek a cease and desist order, as recommended by the examiner. Arrow and Hudson, respectively, contend that the complaints should be dismissed on their merits and that their petitions for declaratory orders should be granted. We have reviewed the record in the light of these petitions and replies.

The mutual facts involved in these proceedings are not seriously controverted. Since the pertinent facts are set forth in considerable detail in the prior report and in even greater detail in the examiner's report, they will be restated here only to the extent necessary for clarity of discussion. We believe that the factual situation can best be explained by setting forth one movement which is representative of the challenged operations.

Hudson and Arrow solicit freight originating at Philadelphia and destined to Allentown, Pa. They provide a regular service between those two points. Neither holds appropriate intrastate authority, but both are authorized on the face of their interstate certificates to provide the service by routing the involved traffic through New Jersey. The normal route between Philadelphia and Allentown is via U. S. Highway 309, a distance of 52 miles, requiring one hour and 50 minutes of driving time. The distance via Hudson's and Arrow's circuitous interstate routes is over 100 miles requiring three and one-half hours driving time. No stops are made to pick up or deliver freight in

[4] Complainant is again supported by the parties listed in footnote 2 except Motor Freight Express. Highway Express, Rodgers, Fowler and Williams and Modern Transfer filed a joint petition; Pennsylvania Railroad filed a separate one.

New Jersey. No economic justification for the circuitous routing of traffic was shown by either defendant.

We are convinced that in the absence of regulation by the Commonwealth of Pennsylvania both defendants would use the normal and direct routes between the Pennsylvania points they hold themselves out to serve. We are satisfied, as were division 1 and the examiner, that in the transportation of freight moving between Pennsylvania points without a prior or subsequent interstate movement, the defendants have attempted in bad faith to convert what is essentially intrastate commerce into interstate commence and thus to defeat the regulatory laws and policies of the Commonwealth of Pennsylvania. In other words, this is a case of subterfuge, pure and simple.

With respect to all matters raised on petition, other than the matter of issuing a cease and desist order, we agree with the conclusions and findings in the prior report. The discussion which follows will be limited to the single issue upon which our conclusion differs from that of the prior report.

In the prior report, division 1 declined to issue a cease and desist order for the following reason:

> "We do not believe, however, that an order directed against such intrastate transportation would be appropriate in these proceedings inasmuch as we have no jurisdiction over intrastate commerce, and the physical operations involved, as actually conducted, violate no provision of the Interstate Commerce Act."

It is true, of course, that this Commission has no jurisdiction over intrastate commerce. We do not agree with the conclusion in the prior report that the challenged operations, as actually conducted, violate no provision of the Interstate Commerce Act. That conclusion appears to us to be contrary to the decision of the Supreme Court in *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959).

The *Service* case involved a carrier which had been transporting freight between certain Virginia points through Bluefield, W. Va., by tacking at the latter point authority issued by this Commission. The carrier held no authority from Virginia. In reviewing the decision of the Supreme Court of Appeals of Virginia finding the carrier guilty of unauthorized intrastate operations, the Supreme Court noted that the transportation was authorized on the face of its interstate certificate. The Court then concluded, *supra*, at 177, that "interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action." In reaching this conclusion, the Court was motivated by a desire to prevent any conflict between Commission and State interpretations of a certificate issued by the Commission.

In response to Virginia's contention in the *Service* case that it must have power to prevent subterfuge operations conducted under the color of authority granted by an I. C. C. certificate, the Supreme Court pointed out, *supra*, at 179:

> "Finally, the Commonwealth is not helpless to act. If it believes that petitioner's operation is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the Act. Section 204(c), . . . authorizes the filing of a 'complaint in writing to the Commission by any . . . State board . . . [that] any . . . carrier . . .' has abused its certificate. See also *Castle* v. *Hayes Freight Lines*, *supra*."

This is the nub of the Court's decision in the *Service* case. If subterfuge operations of the character alleged to have been conducted in the *Service* case, and found in the prior report to have been conducted in the instant proceedings, did not violate the Interstate Commerce Act, the Commission would have no jurisdiction to entertain a com-

plaint filed under section 204(c). Section 204(c) of the Act reads in pertinent part as follows:

> "Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith * * *".

Section 204(c) expressly authorized the Commission to investigate alleged violations of the Interstate Commerce Act and to issue appropriate orders to compel compliance. Obviously, the Supreme Court in the *Service* case did not suggest to the Commonwealth of Virginia a remedy that was in fact not available. In effect, the Supreme Court in the *Service* case interpreted section 204(c) as follows:

> (c) "Upon complaint in writing to the Commission by any . . . State board . . ., the Commission may investigate whether any motor carrier . . . has committed a subterfuge of any state's regulatory jurisdiction. If the Commission, after notice and hearing, finds upon such investigation that the motor carrier has committed such a subterfuge, the Commission shall issue an appropriate order to compel the carrier to cease . . ."

Although the *Service* case was one of first impression with respect to subterfuge operations under the Act, the basic principle had been established in *Castle* v. *Hayes Freight Lines*, 348 U. S. 61 (1954). There, the Supreme Court, in holding that Illinois had no power to bar interstate motor carriers from using its highways, pointed out, *supra* at 65:

> "If, therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no

> reason why the Commission may not protect the state's interest, either on the Commission's own initiative or on complaint of the state."

Although subterfuge operations, unlike the operations involved in the *Castle* case, are not specifically condemned by any regulation of the Commission, cooperation between the Federal government and the several States is woven by necessary implication into the fabric of the Motor Carrier Act and is expressly required by the national transportation policy. We believe that the requirement of Federal-State cooperation in motor carrier regulation is sufficiently definite and essential to support a complaint filed on behalf of a State under section 204(c) of the Act and the issuance of an appropriate compliance order.

We do not mean to suggest, however, that the Commonwealth of Pennsylvania is unable, by virtue of our findings in these proceedings, to enforce its own laws and regulations with respect to the challenged operations of the defendants. We have found, in effect, that those operations are intrastate in character even though, physically, they traverse State boundary lines. Accordingly, within certain limits, those operations are subject to State regulation. Cf. *Eichholz* v. *Public Service Commission*, 306 U. S. 268 (1939). Our order in these proceedings merely enjoins the defendants from using their interstate certificates to evade or subvert lawful regulation by the Commonwealth of Pennsylvania. We do not know whether or to what extent enforcement action under the laws of Pennsylvania would be ineffective or unduly time-consuming. That is a matter that need not be explored since the Interstate Commerce Act clearly contemplates, under the circumstances here disclosed, that the Federal power be made available to supplement that of the States.

On reconsideration in Nos. MC-C-2671 and MC-C-2696, we find (1) that the described operations by defendants between points in Pennsylvania through points in New

Jersey in the transportation of property originating or terminating at points without Pennsylvania are authorized by the respective defendants' certificates; and (2) that the described operations by defendants between the involved points in Pennsylvania, through points in New Jersey, which transportation of property originates and terminates within Pennsylvania, are, but for their routing, in intrastate commerce inasmuch as they are conducted as a subterfuge to evade the laws of Pennsylvania and they are not authorized by their respective certificates; and (3) that an order should be entered requiring each defendant to cease and desist, and hereafter abstain from holding themselves out or performing, under certificates issued by this Commission, all operations herein found to be, in effect, intrastate in character.

In Nos. MC-113933, MC-71536 and MC-71536 (Sub-Nos. 1, 2 and 3), we find on reconsideration that the matters to which the petitions are directed have been disposed of in the findings above and the petitions thus should be denied.

An appropriate order will be entered.

Commissioner Herring, dissenting:

I am unable to agree with the views of the majority as I believe an erroneous interpretation is being placed on the Supreme Court's decision in the *Service* case, 359 U. S. 175. Although I voted for the earlier report while a member of Division 1, on further reflection I believe the discussion therein went too far and should be modified.

Transportation between points in a State through another State is interstate commerce in the most literal sense. Congress might have given to the States authority to regulate such motor transportation, but it elected to occupy this field and gave to the Commission authority to regulate such transportation. Section 203(a)(10) of the Act defines the interstate commerce over which the Commission is given jurisdiction to include commerce "between

places in the same State through another State". This means that this Commission should regulate such transportation in accordance with the Interstate Commerce Act and not prohibit it in deference to the States or motor carriers operating in competition therewith under intrastate authority issued by the States.

Division 1 concluded, and I think correctly, that the certificates issued by the Commission authorize this transportation between points in Pennsylvania through New Jersey. These certificates may be revoked, in whole or in part, only in accordance with the procedure of section 212(a), and only for willful violation of the Interstate Commerce Act or regulations prescribed thereunder. There is no showing here of any such violation.

It is conceivable, although very doubtful, that the Commission under section 208(a) may prohibit transportation such as that involved here by attaching to the exercise of the privilege granted by the certificates, terms, conditions, or limitations found to be required by public convenience and necessity. This proceeding seems, however, not to be directed to those issues and it is not clear to me what evidence, in accordance with the provisions of the Interstate Commerce Act, would support such an action. If the carriers are not charging reasonable rates for the service rendered, the remedy would be to require the rates to be increased. Some shippers may prefer to use such interstate service in lieu of intrastate service, even at the same or higher rates. I see no point in attempting to prohibit them from doing so, particularly when it would involve the application of a vague and uncertain doctrine which would make the meaning of certificates uncertain and which may involve the Commission in interminable arguments as to when a carrier may or may not perform such transportation.

I know of no constitutional or statutory doctrine which requires interstate commerce to defer to intrastate com-

merce. This is particularly true here where the Congress has expressly occupied the field and applied Federal regulation, as pointed out in the definition of interstate commerce in section 203(a)(10). I know of no law or policy which gives to intrastate carriers a right to be free of interstate competition. If there is anything wrong with the interstate carriers' operations, such as their rates, the State or the intrastate carriers have a remedy under the Interstate Commerce Act. What is proposed here is to apply a doctrine of supremacy of State law; a section 13 doctrine in reverse. I find nothing in the Act to support such a proposal.

Prior to the Motor Carrier Act, States exercise a limited jurisdiction over interstate carriers, particularly interstate carriers transporting between points in a State through another State. The *Eichholz* case, 306 U.S. 268, is an example. In the *Service* decision, supra, at 179, the Supreme Court laid this doctrine to rest by pointing out:

> There Missouri revoked a carrier's interstate permit because it crossed state lines into Kansas City, Kansas, for the sole purpose of *creating* an interstate operation. Eichholz, however, had no certificate from the Interstate Commerce Commission, and this court's opinion was premised on this fact rather than that the interstate operations were merely a subterfuge and hence not bona fide.

The use of such terms as "not bona fide", "subterfuge", etc., arose prior to the Motor Carrier Act in the efforts of the State to regulate, to the extent they were permitted, interstate motor carrier operations. The term "bona fide" also was used in the original grandfather clauses as a test as to whether a certificate or permit should be issued to carriers then in operation. Upon the occupation of the interstate field by the Federal Government and the conclusion of the grandfather clause applications, these terms should have passed from the Commission's vocabulary. I do not think it is fitting for the Commission to char-

acterize as "not bona fide" or as a "subterfuge" interstate operations which it has authorized a carrier to perform.

It is true that in the *Service* case, the Court did not go out of its way to criticize the Commission's use in its *Service* declaratory report, 71 M. C. C. 304, and in *Atlantic Frt. Lines, Inc.*, 51 M. C. C. 175, of statements that the operations were not subterfuges and that they were bona fide. There was no occasion to do so since the conclusions were correct, regardless of these comments. From the *Service* decision, however, it is my view that the Court regarded the crucial test to be whether the interstate certificate, as interpreted by the Commission, authorized the transportation. This is indicated by such statements as the following:

> The certificate on its face covers the whole operation. (p. 177)
>
> > It appears clear that *interpretations* of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom Congress has placed the responsibility of action. (p. 177. Emphasis added.)
> >
> > After the Virginia Commission had found petitioner to be operating in intrastate commerce and fined it for such operation, the I. C. C. issued an opinion, 71 M. C. C. 304, in which it *construed* petitioner's certificate as *authorizing* Virginia-to-Virginia traffic routed through Bluefield, West Virginia. This was but a reaffirmation of its prior *interpretation* of the certificate. 59 M. C. C. 803, supra. Such conflicts can best be avoided if the *interpretation* of I. C. C. certificates is left to the Interstate Commerce Commission. (p. 158. Emphasis added.)

A point has been made by the majority of the words "has abused its certificate" in the following statement of the Court:

> Finally, the Commonwealth is not helpless to act. If it believes that petitioner's operation is not bona fide

> interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the Act. Section 204(c), supra, note 2, authorizes the filing of a "complaint in writing to the Commission by any . . . State board . . . [that] any . . . carrier . . ." has abused its certificate. See also Castle Freight Lines, supra. Thus the possibility of a *multitute of interpretations* of the same federal certificate by several States will be avoided and a uniform administration of the Act achieved. (p. 179. Emphasis added.)

The remedies provided in section 204(c) are for violations of the Interstate Commerce Act and requirements established thereunder. The "abuse of its certificate" must, therefore, refer to a violation of the Act or the terms of the certificate. It seems to be that the "Abuse" of the certificate must mean doing, under claim of authority, something not authorized by the certificate. In the context, I do not know of any other act that would constitute an "abuse" of a certificate. This, however, calls for an "interpretation" of the certificate and nothing more. That this is the meaning intended by the Court, to me, is indicated by the immediately following sentence referring to the avoidance of a multitude of *interpretations* of the certificate.

At the time these certificates were issued or at the time they were transferred. if the issue had been raised and such action were found required by public convenience and necessity or the public interest, the Commission *might* have restricted the certificates to exclude transportation between points in the State through another State. However, this was *not* done and the carrier is entitled to engage in all operations within the language of the certificate and, as indicated above, this grant may be revoked only in accordance with section 212(a) of the Act.

In addition to the above, I am concerned as to how the Commission can reconcile the decision herein with the fact

that in countless cases it has granted authority to a carrier to perform an interstate service between points in a single State by operating over highways in an adjoining State. In those cases, it seems to me, the Commission was encouraging the type of operation which the majority now condemns; cf. No. MC-108449 (Sub-No. 85), *Indianhead Truck Line, Inc., Extension—Marshall, Minn.*

It is my view that, upon finding that the transportation in question is authorized by the outstanding certificates, the Commission should deny the complaint of the Pennsylvania Commission with an explanation of the reasons why no further action may be taken in this proceeding.

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 19th day of March A. D. 1962

No. MC-C-2671

PENNSYLVANIA PUBLIC UTILITY COMMISSION
v.
HUDSON TRANSPORTATION COMPANY

No. MC-C-2696

PENNSYLVANIA PUBLIC UTILITY COMMISSION
v.
ARROW CARRIER CORPORATION

No. MC-113933

HUDSON TRANSPORTATION COMPANY—
PETITION FOR DECLARATORY ORDER

No. MC-71536

ARROW CARRIER CORPORATION—
PETITION FOR DECLARATORY ORDER

No. MC-71536 (Sub-No. 1)

ARROW CARRIER CORPORATION—
PETITION FOR DECLARATORY ORDER

No. MC-71536 (Sub-No. 2)

ARROW CARRIER CORPORATION—
PETITION FOR DECLARATORY ORDER

No. MC-71536 (Sub-No. 3)

ARROW CARRIER CORPORATION—
PETITION FOR DECLARATORY ORDER

It appearing, That on November 30, 1960, the Commission, division 1, made and filed its report and order in

the above entitled proceedings, determining the lawfulness of the involved operations;

It further appearing, That upon consideration of the record and of separate petitions filed by complainant, intervenors in support of complainant, and defendants for reconsideration, and replies to defendants' petitions, by order of September 22, 1961, the proceedings were reopened for reconsideration on the present record;

And it further appearing, That reconsideration of the matters and things involved has been given and that the Commission, on the date hereof, has made and filed a report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the report and order of November 30, 1960, are hereby referred to and made a part hereof;

It is ordered, That the said order of November 30, 1960, be, and it is hereby, vacated and set aside;

It is further ordered, That defendants in No. MC-C-2671, and No. MC-C-2696 be, and they are hereby, notified and required within 30 days from the date this order becomes effective pursuant to the provisions of Section 17(5) of the Interstate Commerce Act, to cease and desist, and hereafter abstain from holding themselves out or performing, under certificates issued by this Commission, all operations herein found to be, in effect, intrastate in character;

It is further ordered, That the said petitions in Nos. MC-113933, MC-71536, and MC-71536 (Sub-Nos. 1, 2 and 3) be, and they are hereby, denied.

And it is further ordered, That this order shall become effective on May 7, 1962.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)